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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 795

EDWARD FERTWELL PRICHARD, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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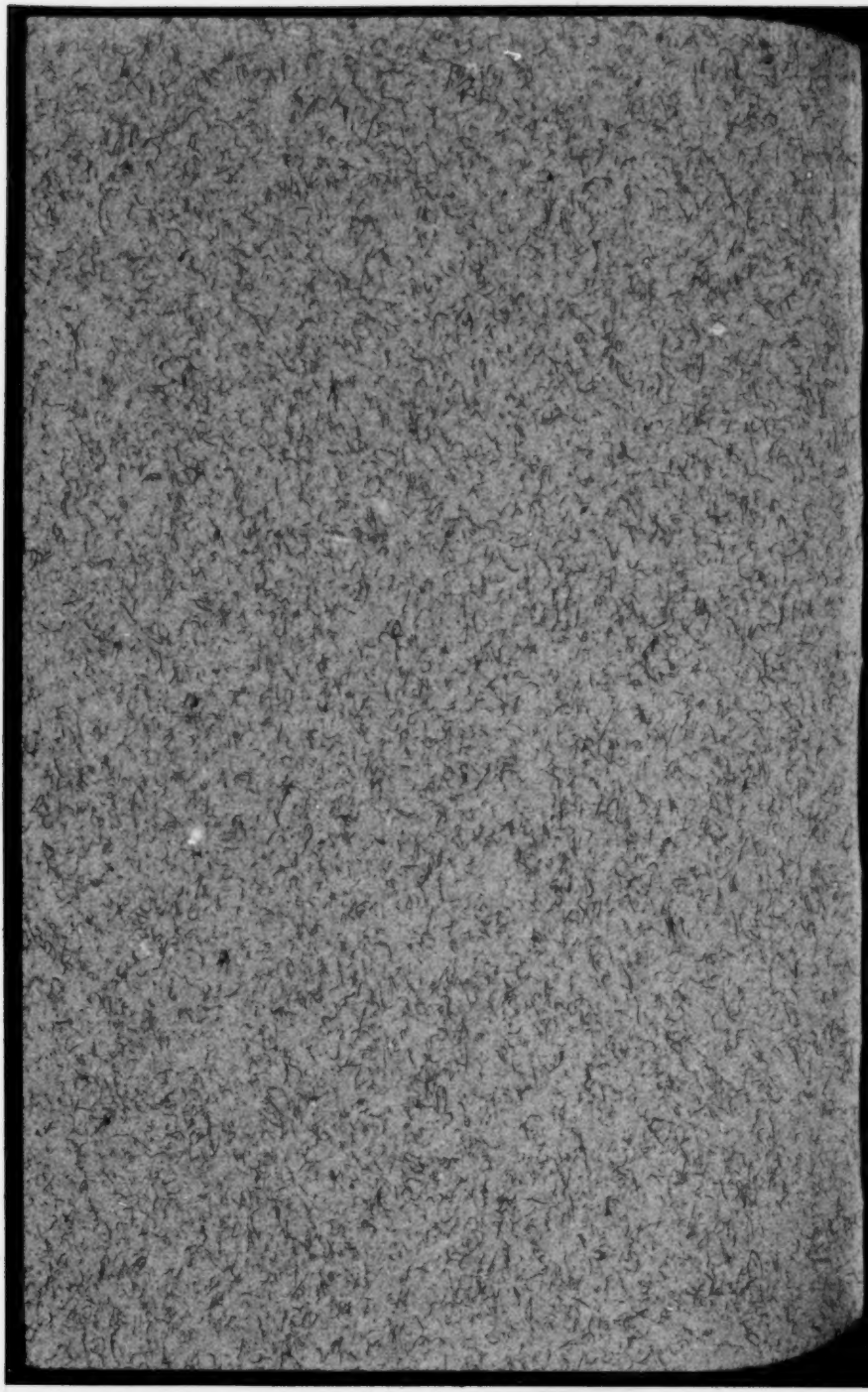

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EDWARD FRETWELL PRICHARD, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the District Court of the United States for the Eastern District of Kentucky—Lexington, convicting petitioner of having conspired in violation of Title 18, United States Code, section 241.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 502-510) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 4, 1950 (R. 501). The jurisdiction of this Court is invoked under ~~Section 1254~~, Title 28, United States Code, section 1254.

Questions Presented.

I.

Whether a conspiracy to place a negligible number of forged votes in the ballot box at a Congressional election constitutes a conspiracy to injure all contrary-voting citizens in the exercise of their right to vote and hence violates the Federal Civil Rights Statute even though there is no allegation or proof of any intent to affect or change the outcome of the election.

II.

Whether the Circuit Court erroneously extended the law of criminal conspiracy by holding that notwithstanding the acquittal of the only other named defendant petitioner's conviction for conspiracy could be sustained by first assuming that more than one person was required to commit the acts disclosed by the evidence and then by treating that assumption as justifying the conclusion that petitioner must have conspired with persons unknown.

III.

Whether the Circuit Court erred in holding that petitioner's confidential disclosures to a judge of a court of the State of Kentucky were not protected by the attorney-client privilege, even though the uncontradicted evidence was that petitioner sought legal advice from the judge and that the judge thought that he could give petitioner legal advice.

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IV.

Whether the Circuit Court erred in holding that the District Court's specific charge, in the concluding passage of its instructions, that the jury might acquit one and convict the other of the two persons indicted for conspiracy, without charging the jury in the same passage that to so convict they must find beyond a reasonable doubt that the single conspirator had conspired with persons unknown, was cured by a previous correct general charge.

Statute Involved.

Section 241 of the Criminal Code (18 U. S. C. 241) provides in part:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * * * *
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Statement.

An indictment returned on April 15, 1949, in the United States District Court for the Eastern District of Kentucky charged petitioner, Edward F. Prichard, Jr., and his law partner, A. E. Funk, Jr. with having violated Section 241 of the Criminal Code by having conspired to impair and dilute the effect of the votes cast for the Republican candidates for President, Senator and Congressman in certain precincts of Bourbon County, Kentucky, at the general election in November, 1948. The indictment charged a conspiracy to remove from the official ballot books a number of blank and unvoted ballots, to forge the names of the clerk and judge of the election on the back of the ballots, to mark the ballots for the Democratic candidates and to place the fictitious ballots in the ballot boxes (R. 1-6).

Defendants' motion to dismiss at the outset of the trial was denied (R. 14-15, 26). At the trial the Government and the defendants stipulated "that at the November election held November 2, 1948, in Bourbon County, Kentucky, that candidates for United States Senator and Congressman were voted for at said election, and that the 254 questioned ballots introduced in evidence were marked for such candidates and other candidates at said election" (R. 198). The Government's evidence fell largely into the following categories (1) proof that 254 ballots had been forged in eleven precincts in Bourbon County; (2) the testimony of a handwriting expert that at least 219 of these 254 ballots were forged by the defendant Funk (the expert testified that he was unable to form any definite conclusion as to the handwriting on the remaining 35 ballots); (3) proof that opportunity existed for access to the ballots and ballot boxes prior to the election; (4) the testimony of William B. Ardery, Judge of the 14th Judicial District of the State of Kentucky about a conversation between him and petitioner; and (5) testimony concerning certain acts of the defendants thought by the Government to support the inference of guilt.

The Government's case against petitioner rested on the testimony of Judge William B. Ardery (R. 363-367). Counsel for petitioner objected to the admission of the testimony of Judge Ardery on the ground that petitioner had consulted Judge Ardery for the purpose of obtaining legal advice and that the communications made in the conversation were thus privileged (R. 366). The trial court found that petitioner "sought legal advice from Judge Ardery" (R. 358), but nevertheless overruled petitioner's objection and Judge Ardery was permitted to testify that petitioner told him "that he and two other young men prepared the ballots here in issue and put them in the ballot boxes before the election began" (R. 366).

At the close of the Government's case, defendants again moved to dismiss and the motion was denied (R. 377). The

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defendants then offered evidence to prove (1) that the ballots were not forged by the defendant Funk; (2) that the actions of both defendants during the period immediately preceding the election were inconsistent with the inference of guilt; and (3) that many persons had means of access to the ballots and the ballot boxes as great as those of the defendants.

At the conclusion of the entire case, defendants moved the Court to direct the jury to return a verdict finding each of them not guilty (R. 444). The motion was denied and the case was submitted to the jury.

The jury acquitted Funk, but found petitioner guilty (R. 492). The District Court sentenced the petitioner to imprisonment for two years (R. 493). Petitioner filed motions for judgment of acquittal, in arrest of judgment and for a new trial (R. 16-18). All motions were denied (R. 18-19).

The petitioner appealed to the United States Court of Appeals for the Sixth Circuit (R. 19-20). The grounds of the appeal were that the proof did not make out an offense under the statute, and that the District Court erred in admitting the testimony of William B. Ardery over appellant's claim of privilege, in holding that there was sufficient corroborative evidence of Ardery's testimony to justify submission of the case to the jury or to support the verdict, and in refusing to set aside the judgment of conviction against petitioner once the other co-defendant was acquitted (R. 16-18). The appeal was argued before the Circuit Court of Appeals on February 10, 1950. On April 4, 1950, that Court handed down an opinion holding that the judgment of the District Court should be affirmed (R. 502-510).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the indictment charged and that proof made out an offense under Section 241 of 18 U. S. C.

2. In holding that there was sufficient corroborative evidence to justify submission of the case against petitioner to the jury or to support the verdict.

3. In holding that the acquittal of the only other defendant did not require that the judgment against petitioner be set aside.

4. In holding that it was not error for the District Court to admit the testimony of William B. Ardery over petitioner's claim of privilege.

5. In holding that it was not error for the District Court to instruct the jury that it might find one of the defendants guilty and the other not guilty.

I.

The Decision of the Circuit Court of Appeals that the Indictment and Proof Established an Offense Under the Federal Civil Rights Statute Decides an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by this Court.

Petitioner's conviction and the affirmance of his conviction by the court below squarely present to this Court for the first time the important question whether Section 241 of the Criminal Code—the general civil rights enactment penalizing conspiracies "to injure . . . any citizen in the exercise . . . of any right or privilege secured to him by the Constitution and the laws of the United States . . ."—makes the addition of a single improper vote to a ballot box at a Congressional election a Federal offense. The affirmative answer to this question given by the court below transforms a statute enacted to protect the individual civil rights of citizens into a law to vindicate the general interest in the purity of elections and it accomplishes this transformation in the very teeth of the action of Congress in 1894 repealing detailed legislation specifically designed to maintain purity in Congressional elections.

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Petitioner respectfully submits that the decision of the court below reinstituting federal control over all minor irregularities at Congressional elections is in conflict with the decision of this Court in *United States* v. *Bathgate*, 246 U. S. 220 and is based on a misreading by the court below of the opinion in *United States* v. *Saylor*, 322 U. S. 385. Petitioner further respectfully submits that the question presented is of fundamental importance since the result reached by the court below will make the Federal Government the policeman of every irregularity at every Congressional election contrary to the clearly expressed intention of Congress to leave to the states the maintenance of purity in elections. Because of the importance of this question, the relevant considerations are herein presented in somewhat more detail than might ordinarily be deemed appropriate for a petition for certiorari.

1. *The indictment and proof:* Funk and Prichard were indicted for conspiring to impair and dilute the effect of the votes cast for the Republican candidates for President, Senator and Congressman in certain precincts of Bourbon County, Kentucky, at the general election in November, 1948, by conspiring and agreeing to remove from the official ballot books a number of blank and unvoted ballots, to forge the names of the clerk and judge of the election on the back of the ballots and mark the same for the Democratic candidates, and to place the fictitious ballots in the ballot boxes (R. 1-6).

This indictment does not rest on any Federal law specifically regulating electoral practices, such as the Federal Corrupt Practices Act or the Hatch Act; no such statute governing elections exists. The only Federal law claimed to support the indictment is Section 241 of the Criminal Code, which is the general civil rights enactment penalizing conspiracies "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . ." In construing this provision in

relation to electoral practices, the question is not how broad an interpretation might conceivably be given to the language, but how broad an interpretation can and should be given to it in light of the declared purposes and objectives of the Congress. The repeal by Congress in 1894 of the detailed regulation of corrupt and irregular practices in Federal elections which had been enacted during the Reconstruction Period was intended to return the control of election irregularities to the States. See pp. 12-13, *infra*. The problem of construction, therefore, is one of accommodation between two actions of Congress and this accommodation can only be found in the limitation of Section 241 to the protection of the individual rights of citizens rather than its extension to vindicate the general interest in the purity of elections.[1] Unless the proof makes out a conspiracy to deprive individual citizens of their personal rights under the Constitution or laws of the United States, no Federal offense has been committed.

In the present case, there is no charge that any citizen was deprived of his right to cast his ballot or that his ballot was altered or uncounted. As a matter of fact, the indictment specifically states that the ballots of the citizens whose rights were alleged to have been injured "were placed in the ballot boxes, counted and certified as part of the total vote cast at said election in said precincts" (R. 2).

In the present case also, there is no allegation in the indictment that the defendants conspired or intended to deprive any citizen of his right to vote by seeking to change the outcome of the election and thus nullify his vote. There was no proof adduced at the trial which would have supported any such allegation. On the contrary, the proof presented by the prosecution itself indicated that whoever placed the improper votes in the ballot boxes had no intent to affect the outcome of the election in any or all of the

[1] State laws, of course, deal in detail with corrupt and irregular practices at Congressional elections. See, e.g., Kentucky Revised Statutes (1948), Chapter 124, Election Offenses and Prosecutions.

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eleven precincts where the ballots were alleged to have been stuffed, or in the Congressional district in which these precincts were located, or in the statewide races for President and Senator. The total number of improper votes which the Government even sought to lay at the door of the defendants was 254 (R. 198). As the table below indicates, these improper ballots constituted approximately three one-hundredths (.03) of 1% of the total votes cast in the Senatorial race and approximately 1% of the difference between the votes cast for the two Senatorial candidates. Equally striking figures for the races for President and Congressman are shown in the table below:[2]

	Votes for Democratic Candidate	Votes for Republican Candidate	Total	Margin	Alleged Improper Votes	Percentage of Total	Percentage of Margin
President	464,639	340,766	805,405	123,873	254	.03 of 1%	.2 of 1%
Senator	408,256	383,776	792,032	24,480	254	.03 of 1%	1.04%
Congressman	60,659	39,251	99,910	21,408	254	.25 of 1%	1.2%

Not only did the alleged improper ballots constitute only an infinitesimal fraction of the votes cast in the three races, but they did not affect the outcome of a single race in a single precinct. The closest race in these precincts was for the Senate and the table below demonstrates that the alleged improper votes did not affect the outcome of the Senatorial contest in a single precinct:

---

[2] Votes for the various candidates are taken from the Congressional Directory (81st Cong., 1st Sess., pp. 244, 246) and The 1949 World Almanac (p. 71).

Precinct	Votes for Chapman	Votes for Cooper	Total Cast	Margin	Alleged Fraudulent Votes
Paris No. 1	170	67	237	103	20
Paris No. 2	226	91	317	135	36[3]
Paris No. 3	200	78	278	122	29
Paris No. 4	236	117	353	119	45
Paris No. 5	148	67	215	81	19
Paris No. 6	131	51	182	80	15
Paris No. 10	130	97	227	33	20
Clintonville No. 3	106	35	141	71	17
N. Middleton No. 1	166	82	248	84	22
N. Middleton No. 2	163	40	203	123	15
N. Middleton No. 3	75	45	120	30	16
Totals	1751	770	2521	981	254[3]

[3] One of the ballots at Paris No. 2 (Q. 56) was not marked (R. 310). We have nevertheless included it in the total count because of the stipulation setting the figure at 254 (R. 198).

The precinct-by-precinct margins of the Democratic candidates for President and Congressman were even greater.

The Government produced no evidence at the trial of any intent on the part of the defendants to affect the results in any of the eleven precincts concerned or in any of the three election contests. The Government did not even suggest that the properly attested results of the election, so far as Bourbon County was concerned, were more favorable to the Democratic candidates than the defendants or the public generally had anticipated. It is well known that Bourbon County is traditionally a Democratic county; the Congressional district of which Bourbon County is a part has been represented by other than a Democrat in the Congress only once (1929-31) since the War Between the States. As far as intent is concerned, therefore, the negligible number of ballots and the political realities of Bourbon County speak for themselves and demonstrate the complete absence of any intent to effect the outcome of the election.

The defendants moved to dismiss at the outset of the trial and again at the conclusion of the Government's case

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on the ground that no Federal offense had been charged or proven (R. 14-15, 26, 377). The District Court denied both motions (R. 26, 377).[4] The District Court's charge to the jury was in general terms and required the jury to find that a violation of Federal law had been committed if the defendants conspired to place the disputed ballots, or any of them, in the ballot box (R. 464, 469, 474, 481). The only intent required by the charge was that defendants intended to "cause a dishonest, inaccurate, and false count of the votes actually cast in those precincts at the election . . ." (R. 464), or that they intended "to bring about a dishonest count . . ." (R. 474). There was no suggestion in the judge's charge that the jury could find guilt only if the defendants intended, as expressed through their words or their actions, to prevent any citizen from voting or to nullify the vote of any citizen by seeking to affect the outcome of the election. The jury was required to find guilt under Section 241 if they found a conspiracy to add a single improper ballot to the ballot box at a Congressional election.

The Government rested its case in the indictment, in its proof at the trial and in its brief in the court below upon the novel doctrine that the addition of a single improper vote to a ballot box at a Congressional election is conclusive evidence of an intent to injure and oppress every contrary-voting citizen in the free exercise of the right to vote secured to him by the Constitution of the United States. The court below accepted this doctrine, expressly rejecting petitioner's opposing contention that the civil rights statute "is limited to the protection of the individual rights of citizens and was not intended to vindicate a general interest in the purity of elections" (R. 509). The result of this decision of the court below, if sustained, will be to make the Federal Government, not simply the guardian of the

[4] Subsequent motions to direct the jury to return verdicts of not guilty and in arrest of judgment were likewise denied (R. 17, 18-19, 444).

citizen's right to vote, but the policeman of every irregularity at every Congressional election. The legislative history of Section 241 and its interpretation by this Court require the rejection of any such doctrine.

2. *Legislative history of Section 241:* Even a cursory review of the history of Congressional legislation in the election field will demonstrate that since the repeal of the Reconstruction Legislation in 1894, the Congress has never evinced the slightest intention of making Federal offenses of irregularities at Congressional elections. Congress has always had full power to regulate the conduct of Congressional elections pursuant to Section 4 of Article 1 of the Constitution. Yet, from the adoption of the Constitution until 1842, Congress took no steps whatever to regulate the conduct of Congressional elections, and in 1842 entered the field only to the limited extent of requiring that representatives be elected by Districts rather than at large. 5 Statutes at Large, p. 491, Ch. 47. Then in 1870, as a part of a program of legislation for the Reconstruction Period, Congress finally adopted a comprehensive set of laws dealing with Congressional elections (16 Stat. 144, 254). These laws made unlawful false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election, and otherwise tampering with a Congressional election. By the Act of February 8, 1894 (28 Stat. 36), however, Congress repealed practically all of the 1870 law and thus restored the control of Congressional election machinery to the States. It left only what are now Sections 241 and 242 of the Criminal Code which do not authorize the Federal Government to supervise Congressional elections but merely provide for the punishment of conspiracies to interfere with the exercise by the individual citizen of rights—including the right to vote—secured to him by the Constitution or the laws of the United States. The Report of the Committee (H. Rep. No. 18, 53d. Cong., 1st Sess., p. 7) sponsoring the repeal makes this crystal-clear:

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> "Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union."

Mr. Justice Clarke, speaking for a unanimous Supreme Court in *United States* v. *Gradwell*, 243 U. S. 476, 482-485 in denying that a conspiracy to bribe electors at a Congressional election constituted a Federal offense, summed up Congressional action in the election field as follows:

> "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the Government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are."

On the basis of a detailed historical analysis, Mr. Justice Clarke concluded that it was:

> ". . . thus clearly established that the policy of Congress for so great a part of our constitutional life has been, *and now is*, to leave the conduct of the election of its members to state laws . . ." (Italics supplied)

Despite this clear Congressional policy, the Government is contending that a conspiracy to place a negligible number of improper votes in a ballot box at a Congressional election constitutes a Federal offense and in particular constitutes the Federal crime of conspiring to injure and oppress all contrary-voting citizens. A review of the decisions of

this Court will indicate that no such rule of law has been enunciated or implied.

3. *Judicial history of Section 241:* In *United States* v. *Mosley,* 238 U. S. 383 this Court held that a conspiracy of two election officials, constituting a majority of the County Election Board, to deceive the third member of the Board and exclude the votes of certain voters in the returns made to the State Election Board, constituted a violation of Section 19 of the Criminal Code.[5] This Court found the right to have one's vote counted indistinguishable from the right to put the ballot in the box. Rejecting the contention that Section 19 was limited to conspiracies contemplating violence, the Court held that a conspiracy not to count the ballots of certain voters constituted an injury to or oppression of those voters in the exercise or enjoyment of their constitutional right to vote. The dissenting Justice thought that the repealing act of 1894 prevented such a construction of Section 19.

Three years later this Court made it quite clear that the *Mosley* case did not hold that Section 19 of the Criminal Code made every irregularity at a Congressional election a Federal offense. In *United States* v. *Bathgate,* 246 U. S. 220, a unanimous Court ruled that a conspiracy to bribe certain voters at a Congressional election did not constitute the oppression of contrary-voting citizens in the exercise of their right to vote. The Court pointed out that Section 19 was intended to protect the personal right of the individual citizen to vote and not any general right of the public in an honest election. After "considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes" (p. 226), the Court concluded as follows (pp. 226-227):

> "*The right or privilege to be guarded,* as indicated both by the language employed and context, *was a definite, personal one,* capable of enforcement by a court,

[5] Now Section 241.

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and not the political, non-judicable one common to all, that the public shall be protected against harmful acts, which is here relied on. The right to vote is personal and we have held it is shielded by the section in question." (Italics supplied)

In *United States* v. *Classic*, 313 U. S. 299, a majority of this Court held that a conspiracy to alter the ballots of individual voters at a primary election and to count them falsely constituted a conspiracy to injure those voters in the exercise of their constitutional rights. Mr. Justice Stone, speaking for the majority, held that the right guarded by Section 241 was the "right to choose" members of Congress and "obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections." 313 U. S. 299, 315. There was no suggestion that this "right to choose" included the right to be free from every election irregularity and indeed the Court in no way questioned the validity of the *Bathgate* and *Gradwell* cases. See 313 U. S. at 324. The three dissenting Justices held that the *Mosley* case "went to the verge when it held that § 19 . . . made it a crime to fail to count votes cast at a general election" (p. 334) and refused to extend the *Mosley* case to primary elections.

4. *The Saylor case:* It is in the light of both the legislative and judicial history of Federal control over Congressional elections that the ruling in *United States* v. *Saylor*, 322 U. S. 385, must be viewed. That case involved the Harlan County, Kentucky, vote frauds of 1942. The two cases that came before this Court were two of 26 separate indictments involving 99 county election officials. See *Carr, Federal Protection of Civil Rights*, 1947, p. 97. Indicted in the *Saylor* case were four defendants—two election judges, the election clerk, and the election sheriff. These four defendants were charged with a conspiracy to add fictitious votes to the ballot box "for the unlawful and

felonious purpose of . . . preventing the actual and intended choice of said voters from being expressed . . ." The district judge sustained a demurrer to the indictment. Upon appeal, a majority of this Court reversed the district judge, holding that a violation of the statute could be proved under the indictment demurred to and that the case thus fell within the ruling in the *Mosley* case rather than the ruling in the *Bathgate* case.

The majority in the *Saylor* case went to the extreme edge of the law in holding that the constitutional right of a citizen to vote might be injured and oppressed by a conspiracy which, so far as one could judge from the indictment that came before the Supreme Court on demurrer, had as its purpose the stealing of the election. The indictment there charged that the defendants had entered into a conspiracy "for the unlawful and felonious purpose of . . . preventing the actual and intended choice of said voters from being expressed . . ." Viewing the *Saylor* indictment in the light of the massive fraud which had been perpetrated upon the citizens of Kentucky by 99 election officials, it seems clear that this Court, in sustaining the indictment against the defendants' demurrer, accepted the allegations as charged and concluded that it had before it a case in which the defendants intended to affect the outcome of the election. Indeed, Mr. Justice Roberts specifically stated that "If the voters' rights protected by § 19 are those defined by the *Mosley* case, the frustration charged to have been intended by the defendants in the present cases violates them" (p. 389). The right defined in the *Mosley* case is the right to have one's vote counted. In holding that the defendants in the *Saylor* case intended a frustration of the rights protected under the rule of the *Mosley* case, Mr. Justice Roberts could only have meant that the defendants in the *Saylor* case intended a nullification of rights as real as a refusal to count votes legally cast, a nullification which could only be accomplished by affecting

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the outcome of the election.[6] What the *Saylor* case holds, and all that it holds, is that an indictment under which the Government is free to prove a conspiracy to steal a Federal election and thus nullify the votes of contrary-minded citizens was not subject to demurrer.

This Court in the *Saylor* case gave no intimation that the addition of a single improper vote to a ballot box at a Congressional election constitutes a Federal offense and the dissenting Justices did not suggest that the majority was reaching any such far-flung and radical decision. Indeed, despite the apparent inconsistencies in some of the language in the *Saylor* case with the *Bathgate* case, this Court did not overrule that case, nor seek to challenge the reasoning in the *Gradwell* case upon which the *Bathgate* case relied. Its action can only be explained, as we have already shown, on the assumption that the Court found the conspiracy to steal the election and thus nullify the votes of all contrary-minded citizens a frustration of the personal right to vote delineated in the *Bathgate* case.

Section 241 of the Criminal Code has been on the statute books nearly 80 years and this Court has never affirmed any conviction thereunder for local election irregularities which could not reasonably have been intended or calculated to deprive a citizen of his vote by preventing it from being cast or counted or to deprive him of his vote or his right

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[6] It should be noted that the Government, in its Statement As To Jurisdiction in the *Saylor* case, when it apparently feared the affirmance of the District Court's dismissal of the indictment on the basis of the *Bathgate* case, made the identical point:

> "When the effect [of fictitious votes] is to change the outcome of the election, each voter for the losing candidate is deprived of the whole value of his vote, and all voters at the election are deprived of their right of representation by the majority's choice, as effectively as though the majority's vote had not been counted at all. In the ultimate result, it makes no difference to an individual voter whether his vote is not counted at all or is diminished in value to the point of insignificance by false and fictitious ballots. The situation in the present case seems therefore to fall within the rule of the *Mosley* case" (p. 8).

to choose by affecting the substantive results of the election. It would be a perversion of the law to apply a statute designed to protect the basic rights of citizens to every petty election fraud. Foolish action, however reprehensible, which could only have the effect of making a good showing for a particular precinct or a particular county cannot be distorted by misplaced reliance on the *Saylor* case into an attempt to deprive any citizen of his constitutional rights.

5. The indictment and proof in the present case fail to make out a conspiracy to injure or oppress any citizen in the exercise of any personal right within the meaning of Section 241. There was no conspiracy to deprive any citizen of his right to have his vote counted. *United States* v. *Mosley, supra.* There was no conspiracy to deprive any citizen of his "right to choose" members of Congress. *United States* v. *Classic, supra.* There was no conspiracy to nullify the voting right of any citizen by affecting the outcome of the election. *United States* v. *Saylor, supra.* What was attempted to be proved against the defendants here, in the words of the District Court's charge to the jury, was a conspiracy "to bring about a dishonest count" (R. 474). What was attempted to be proved was not a conspiracy to injure or oppress the personal right of any citizen but only a conspiracy against the purity of a Congressional election. However deplorable such action may be, Congress has left its punishment to the States.

Any extension of the *Saylor* case beyond its exact factual situation will make the Federal Government the policeman of all Congressional elections—in the very teeth of the legislative and judicial history of Section 241. Certainly there is no reason in law or experience for holding that the addition of a few improper votes which could not affect the result of the election comes within the statute but that the procuring of a similar number of votes by bribery does not come within it. The extension of the *Saylor* case to cover the offense now before this Court can thus only mean that

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the addition of a single improper vote to a ballot box at a Congressional election or the bribery of a single voter will constitute a Federal offense. A result of such far-reaching importance—the reinstitution of Federal control over all minor irregularities at Congressional elections—should not be effected *sub silentio* on the basis of an unreasoned and unreviewed opinion of an inferior Federal court.

II.

The Jury Having Acquitted the Codefendant Funk, the Charge of Conspiracy Cannot Be Sustained Against Petitioner, the Sole Remaining Defendant, There Being no Evidence that Petitioner Had Conspired With Any Person Other than Funk; the Decision of the Court Below is an Unprecedented and Dangerous Extension of the Law of Criminal Conspiracy.

Before the Court of Appeals, the petitioner contended that his conviction could not be sustained in view of Funk's acquittal. This argument was based on the well-established principle that if all but one of a group of alleged conspirators are acquitted, the conviction of the remaining defendant cannot stand, the one exception to the principle being that the conviction may be sustained if there is substantial evidence that the remaining defendant conspired with persons unknown. *Morrison* v. *California*, 291 U. S. 82, 93; *Hartzel* v. *United States*, 322 U.S. 680, 682 (Footnote 3); *Gebardi* v. *United States*, 287 U.S. 112, 123; *Alkon* v. *United States*, 163 Fed. 810, 811 (C.C.A. 1st 1908); *Feder* v. *United States*, 257 Fed. 694 (C.C.A. 2nd 1919); *Williams* v. *United States*, 282 Fed. 481, 484 (C.C.A. 4th 1922); *Turinetti* v. *United States*, 2 F. 2d 15, 17 (C.C.A. 8th 1924); *Bartkus* v. *United States*, 21 F. 2d 425, 428 (C.C.A. 7th 1927); *Cofer* v. *United States*, 37 F. 2d 677, 680 (C.C.A. 5th 1930); *Worthington* v. *United States*, 64 F. 2d 936 (C.C.A. 7th 1933); *Gros* v. *United States*, 138 F. 2d 261 (C.C.A. 9th 1943).

The decision of the Court of Appeals rejecting this contention is in conflict with decisions of this Court and with decisions of other circuit courts of appeal. The unprecedented and erroneous principles applied by the Court of Appeals extend the law of criminal conspiracy far beyond the limits hitherto accepted by the courts. In view of the dangers and abuses to which the law of criminal conspiracy is particularly subject, see the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U.S. 440, 445; *Glasser* v. *United States,* 315 U.S. 60, 76; *Kotteakos* v. *United States,* 328 U.S. 750, 776-777; and see the *Annual Report of the Attorney General for 1925,* pp. 5-6, the decision raises a question of general application and importance that should be considered by this Court.

The relevant passage in the opinion of the Court of Appeals follows (R. 509):

> "If the indictment charges a conspiracy among named defendants and other persons unknown to the grand jury, and it appears at the trial that there was such conspiracy but that only one of the named defendants was a member of it, it is sufficient to support a conviction if it is shown by substantial evidence that the parties unknown at the time the indictment was returned committed overt acts therein alleged. Such evidence there was. The alleged conspiracy could not have been carried out by one person because it required access to the clerk's office, a careful removal of the stolen ballots so that their theft could not be detected, and the forgery of approximately 44 different signatures on 254 ballots, deposited in the ballot boxes of 11 precincts. The signatures on the ballots were not the signature of Prichard but were, according to the evidence, made in a number of different handwritings."

In this passage the Circuit Court says, in effect, that proof that petitioner did not do certain acts justifies the conclusion that he must have conspired with persons unknown. This reasoning nullifies the principle that if all but one of the group of alleged conspirators are acquitted the

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remaining defendant must also be acquitted unless there is substantial evidence that he conspired with persons unknown.

The Circuit Court reasoned that since it was satisfied that more than one person was required to perform the acts disclosed by the evidence, it could properly assume, Funk having been acquitted, that the petitioner must have conspired with someone else who was unknown.[7] This method of reasoning necessarily required the Court to treat the evidence that the Government had offered to prove the participation of Funk as proof of a conspiracy between petitioner and "persons unknown." The point is sharply illustrated by the Circuit Court's use of the handwriting testimony.[8] That testimony was offered by the Government for the sole purpose of proving the participation of Funk in the alleged conspiracy. The jury having rejected the evidence for that purpose, the Court of Appeals treated the evidence as proving the participation of an unknown person in the conspiracy even though the proof was never offered for that purpose and was never presented to the jury in that light.

The fallacy of this line of reasoning is that it allows the acquittal of Funk to prove too much. It is not possible to know precisely what view the jury took of the handwriting

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[7] It is significant that the Court of Appeals did not regard the evidence of Judge Ardery as establishing the participation of "unknown persons" in the alleged conspiracy. Apparently the Circuit Court recognized that the evidence related to known and identified persons and not to "unknowns." See pp. 28-30, *infra*.

[8] The passage in the Circuit Court's opinion dealing with the handwriting testimony is marked by a grave error of fact: There was no evidence that the signatures on the ballots were "in a number of different handwritings." On the contrary, the Government's handwriting expert testified that the handwriting on 219 of the ballots was the handwriting of Funk and that he could not reach a definite conclusion about the handwriting on 35 of the ballots (R. 311, 315, 317-320, 321, 322, 323). The prosecution argued to the jury that all of the 254 ballots had been forged by Funk and that the reason for the apparent difference between the handwriting on 219 of the ballots and the handwriting on the other 35 ballots, was that in the case of the 35 ballots the author had sought to disguise his writing (R. 458).

testimony. Its members may have rejected the handwriting testimony *in toto;* in that event, the evidence can hardly be regarded as proof of the participation of persons unknown. The jury may have regarded the evidence as tending to prove the participation of Funk, but as failing to establish that fact beyond a reasonable doubt. If so, the proof cannot be regarded as evidence of the participation of persons unknown. In any event, the acquittal cannot be used as a basis for the assumption that the evidence offered against Funk was regarded by the jury, or can now be regarded by the appellate courts, as proving a conspiracy between petitioner and "persons unknown."

Nearly one hundred years ago, the Court of Queen's Bench in England held that the conviction of a single conspirator could not be upheld by assuming that evidence offered against known and named alleged conspirators could be treated as if it were evidence of the participation of "unknown persons" or by any similar surmise or supposition. In *Regina* v. *Thompson,* 16 Q.B. 832, 117 Eng. Rep. 1100 (1851) three men had been indicted for conspiring among themselves and with persons unknown. The jury's verdict was that A had conspired with either B or C but that it could not determine which. Upon review it was argued by the Crown that the verdict could be sustained on the ground that A had conspired with unknown persons. The court held, however, that the evidence offered to prove the participation of B and C could not be treated as if it were evidence of a conspiracy between A and unknown persons and that the conviction of A could not be upheld on the basis of a surmise that he must have conspired with either one or the other of the two acquitted defendants.

It is submitted that the decision of the court below is the first time that any court in this country has departed from the traditional concepts of the common law of conspiracy as they were laid down by the judges in *Regina* v. *Thompson, supra.* The Federal courts have consistently held that

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the conviction of a single alleged conspirator cannot be sustained unless there is in the record substantial evidence that connects him either with another convicted defendant or with some *other* definite known or unknown person. *Worthington* v. *United States,* 64 F. 2d 936 (C.C.A. 7th 1933); *Bartkus* v. *United States,* 21 F. 2d 425, 428 (C.C.A. 7th 1927); *United States* v. *Hamilton,* 26 Fed. Cases, No. 15288, pp. 90-91 (C.C.S.D. Ohio 1876). See also *Commonwealth* v. *Brown,* 23 Pa. Super. Ct. 470, 508 (Pa. Super. Ct. 1903).

The decision of the court below is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Worthington* v. *United States, supra.* In that case, as in this one, two were indicted and tried for conspiring with each other and others unknown. The *Worthington* case, like this one, involved acts in which more than one person may have participated. As in that case the Government suggested but offered no evidence that one Meyers (who was known to the grand jury but not indicted) might have been involved, so here the Government suggested but offered no evidence that one Baldwin, the County Attorney (who also was known to the grand jury but not indicted), might have been involved. There, as here, the prosecution did not even suggest that a fourth person might have participated. In both cases only one defendant was convicted, but in direct conflict with this case, the *Worthington* conviction was reversed because (64 F. 2d 936 at 939):

> "The trouble with the record in the instant case is that the indictment named two persons, appellant and Freiburger, as the two conspirators. The jury found Freiburger was not a party to the conspiracy. The evidence fails to show any other persons, to the grand jury unknown, who could take Freiburger's place and supply the necessary second party to the conspiracy.
>
> "The only person who could possibly have been a party to the conspiracy was one Meyers. He was, however, to the grand jurors known, and moreover, the evidence does not establish even a prima facie case of his participation in the alleged conspiracy."

In all of the cases in which the conviction of a single conspirator has been upheld, there has been direct evidence that in addition to the named conspirators other persons, in fact unknown but capable of identification, had performed specific acts in furtherance of the conspiracy. In none of the cases did the Court assume, as the Circuit Court did here, that evidence offered against acquitted defendants could be treated as if it were evidence against unknown persons. Thus, for example, in *Browne* v. *United States*, 145 Fed. 1 (C.C.A. 2d 1905), the sole convicted defendant was a weighing clerk in the customs office. He fraudulently validated bills of lading which improperly understated the weight of certain dutiable imports. But there was evidence that these bills of lading were fraudulently made out abroad, by unknown persons, and that the owner of the goods had improperly had them consulated in France. The convicted defendant was part of a well organized criminal machine. There was ample evidence to connect him with known and unknown co-conspirators not made defendants and to place these defendants in an identifiable role in the scheme. So in *Pomerantz* v. *United States*, 51 F. 2d 911 (C.C.A. 3rd 1931) where a single defendant was convicted of conspiring to violate the prohibition laws, there was definite evidence connecting the convicted defendant with unknown men who were seen scraping labels from drums containing denatured alcohol.[9]

The decision below is also in conflict with the applicable decisions of this Court in another important respect. The court below regarded its conclusion that more than one person was needed to perform the acts in question as a sufficient basis for the further conclusion that petitioner must have conspired with persons unknown. This process of reasoning ignores elements which this Court has held to be essential to the crime of conspiracy, and by so doing, improperly broadens a concept of criminality already danger-

[9] Cf. *McDonald* v. *United States*, 9 F. 2d 506 (C. C. A. 8th 1925) where ten conspirators were *seen* to assault a Postmaster. Only four were indicted and only one convicted.

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ously vague. The essence of a conspiracy is a criminal agreement to commit acts, illegal if in pursuance to such agreement. *In this case the court below does not require proof of a conspiratorial agreement, but merely proof that more than one was required to perform the acts charged.* In effect, the Court adopted the erroneous definition of conspiracy condemned by Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 (Note 4 at p. 447) (1949):

> "Justice Holmes supplied an oversimplified working definition in *United States* v. *Kissel*, 218 U.S. 601, 608: 'A conspiracy is a partnership in criminal purposes.' This was recently restated 'A conspiracy is a partnership in crime.' *Pinkerton* v. *United States*, 328 U.S. 640, 644. The latter is inaccurate since concert in criminal purposes, rather than concert in crime, establishes the conspiracy."

If, as the court below erroneously assumed, more than one was required to carry out the conspiracy, it does not follow without proof that those others were involved in a criminal plan or agreement. For example, it would have been perfectly possible for any number of persons to give Funk or petitioner the key to the clerk's office without having any criminal intent in so doing. The mere fact that a person incidentally or inadvertently aids in the cosummation of a criminal plan does not involve him in a conspiracy. *United States* v. *Falcone*, 311 U.S. 205; *Weniger* v. *United States*, 47 F. 2d 692 (C.C.A. 9th 1931); *Kuhn* v. *United States*, 26 F. 2d 463 (C.C.A. 9th 1928). Conversely, the fact that a person may have incidentally been aided in carrying out an overt act, criminal if in pursuance of a conspiracy, does not make that person a conspirator.

By thus confusing the basic elements of the law of conspiracy, the Court sets a dangerous precedent which further undermines the *Worthington* line of cases by permitting an appellate court's inference that more than one person must have been involved in carrying out a conspiracy to supplant proof that others not made defendants did in

fact conspire. Furthermore, the decision of the Court of Appeals permits a defendant to be convicted of conspiracy on the simple showing that he had committed an overt act, criminal only if in pursuance of a conspiracy, and that at some time, and in some manner, someone, however innocently, must have aided him.

If given general application the reasoning of the Court of Appeals in this case would mean that in any conspiracy case in which a jury has acquitted all but one of the defendants, the assumption may be made that the acquittal justifies the use of the evidence offered against the acquitted defendants as evidence of a conspiracy between the convicted defendant and "persons unknown." As a practical matter this result destroys the principal hitherto accepted that a single conspirator may be convicted only if there was evidence before the jury that connects the convicted defendant not with an acquitted defendant, but with some other person or persons unknown. This extension of the law of conspiracy also necessarily means that the conviction of a single defendant may be sustained, as it has been in this case, on an issue that in fact was never tried or submitted to the jury.

In the District Court this case was tried on the issue of an alleged conspiracy in which Prichard and Funk were partners. The case was not tried on the issue of any conspiracy between petitioner and unknown persons, and there is no evidence in the record that could support the conclusion that petitioner conspired with unknown persons.

As a matter of form the indictment charged generally that the two named defendants did "conspire among themselves and with each other and with others unknown" (R. 4), but the particularized parts of the charging paragraph specifically confined the charge of conspiracy to Funk and petitioner (R. 4-5).

In his opening statement the United States Attorney, except for a casual reference to the possibility that "others" might have been involved, did not even suggest

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that the Government would attempt to prove that any person other than Funk and petitioner were involved in the alleged conspiracy. Significantly, the United States Attorney concluded his opening statement with the remark that he expected the jury would be able to find "that the defendant A. E. Funk, Jr. is guilty of a part of this conspiracy as charged in the indictment, that is, that he wrote the names upon the back of these ballots, and that his law partner and friend, who was there on the day of the election . . . and who through his friend Baldwin had access to the ballot room where the ballots were kept, that he is equally responsible with Mr. Funk for having caused to be placed and placed in the ballot box these fictitious and forged ballots" (R. 40).

In its proof, too, the Government adhered to the theory of the opening statement. The bulk of its evidence was devoted to an unsuccessful attempt to convince the jury that Funk forged the ballots. On the assumption that Funk's guilt could thus be established, the Government then sought to link petitioner to Funk and to the alleged conspiracy by the known association of the two men as law partners and by proof of statements and acts of petitioner after the election irregularities were discovered.

In his closing statement the United States Attorney discussed the evidence on the assumption that the pivotal issue in the case was the alleged conspiracy between Funk and petitioner. He made no reference whatever to persons unknown and he did not argue that there was any evidence, either direct or circumstantial, that would justify the jury in finding that any persons other than Funk and petitioner had participated in the conspiracy. The District Attorney did refer to the activities of Baldwin, the County Attorney, in terms that might have led the jury to believe that the District Attorney regarded Baldwin's conduct as suspicious (R. 448, 449, 451). But the District Attorney did not name Baldwin as a co-conspirator or argue that Baldwin was criminally involved with the defendants. That

argument would hardly have been admissible in view of the fact that the grand jury had refused to indict Baldwin and that there was nothing in the record to support the charge of conspiracy against him.

In the court below the Government argued that Judge Ardery's testimony could be regarded as evidence that petitioner had conspired with persons unknown. As it has been pointed out at p. 21, *supra*, the Court of Appeals did not accept this contention, and for good reasons. Judge Ardery's testimony was not evidence of the participation of "unknown persons" in the conspiracy. It was not offered at the trial for that purpose, and in fact the testimony related not to unknown persons, but to persons who were known and who could have been easily identified. To treat the testimony otherwise now for purposes of appellate review would be to affirm petitioner's conviction on the basis of a fiction and to deny him a fair trial.

After Judge Ardery had testified the Court discussed with counsel the admonition that he should give to the jury with respect to this testimony. The judge proposed to admonish the jury that the testimony might be considered only "in respect to the existence of a conspiracy as between Prichard and other persons." The following colloquy then ensued (R. 369-370):

> "Mr. Bradley, Sr. (Defense Counsel): Other than the defendant Funk.
>
> "The Court: I don't know who the other persons are.
>
> "Mr. Stephens (U. S. Attorney): I doubt if it is the law. I don't believe the attorney can limit the effect of our testimony. He says that there were two other men, he doesn't name them.
>
> "The Court: That is to be considered in connection with the existence of a conspiracy to which Prichard was made a party, that is all. What do you say, gentlemen? I will change this existence of a conspiracy to which Mr. Prichard was made a party, instead of Prichard and other persons."

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The Court thereupon eliminated from the admonition the reference to other persons and instructed the jury that the testimony of Judge Ardery could be considered only "in respect to the existence of a conspiracy to which Mr. Prichard may have been a party" (R. 370).

It should be noted that the United States Attorney objected to the proposed admonition that the testimony should be considered only as evidence of a conspiracy between petitioner and persons *other than the defendant Funk*. The purpose of the United States Attorney's objection was to have the testimony presented to the jury in such a way that they might regard it, taken in connection with other evidence introduced by the Government against Funk, as evidence of the alleged conspiracy between Funk and petitioner. In fact, this was the contention urged upon the jury by the United States Attorney in his closing statement; he did not argue that Judge Ardery's testimony showed that others than Funk had participated in the conspiracy; he argued that the testimony proved the existence of a conspiracy between Funk and petitioner (R. 452, 457-458).

The identity of the other two young men mentioned in Judge Ardery's testimony was not unknown; it was known but suppressed. It is true that the names were suppressed in an effort to protect the interests of the defendant Funk, but the purpose of the expurgation cannot overcome the fact that the tesimony of Judge Ardery was incomplete and expurgated on the very issue that is decisive if that testimony is to be used as evidence that petitioner conspired with persons unknown. The conviction of a single conspirator should not be sustained by treating testimony about *known* persons as if it were evidence about *unknown* persons or by indulging in conjecture about what the jury might have concluded if the testimony had been disclosed to it in its entirety.

The jury never heard Judge Ardery's complete account of the alleged conversation with petitioner. It is not now

possible to know what effect the jury would have given to the testimony if it had been complete and unexpurgated. In that situation the jury would then have been required to decide, in the light of the entire record, whether petitioner had conspired with either one or both of two named and identified men. It is certain that Judge Ardery, had he been permitted to do so, would have named Funk as one of the young men, but petitioner's conviction cannot now be sustained on the ground that he conspired with Funk.[10] If, as seems possible and as the Government apparently believes, Judge Ardery would have named Baldwin as the other young man, this Court cannot now assume that the jury would have found that petitioner had conspired with a man whom the grand jury would not indict and against whom the Government could make no case.

If petitioner is to be convicted for having conspired with persons other than Funk then the issue of the participation of those persons in the alleged conspiracy should be fully tried and the evidence on that issue should be presented to a jury in a complete and not in a truncated and expurgated form.

III.

In Rejecting the Claim of Privilege and Holding Judge Ardery's Testimony Admissible the Circuit Court Disregarded the Principles Hitherto Applied by the Courts to the Attorney-Client Relationship; This Unprecedented and Unwarranted Departure from the Usual Standards of Judicial Decision Raises an Important Question that Should be Decided by this Court.

A.

The Federal Rules of Criminal Procedure require that the question whether petitioner's statements to Judge Ardery were privileged be decided "by the principles of

[10] It was only because Judge Ardery would have named Funk that the names of the two young men were suppressed (R. 362).

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the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26. The decision of the Court of Appeals does not comply with this standard. The reasoning of the Court disregards the common law principles governing the attorney-client privilege that have been developed and applied by the Federal and State courts in this country and by the courts of England. Neither the District Court, the Court of Appeals, nor the Government has cited a single authority justifying this disregard of historic principle.[11] This failure to heed authority is not cured by any considerations of "reason and experience"; those considerations require the conclusion that all elements necessary to the attorney-client privilege existed in this case.

The decision of the Court of Appeals has a significance that transcends the incidents of the particular case. For more than one hundred years this Court has recognized the importance of protecting confidential communications made by those seeking legal advice. *Chirac* v. *Reinicker,* 11 Wheat. 280, 294; *Conn. Mut. Life Ins. Co.* v. *Schaefer,* 94 U.S. 457, 458; *United States* v. *Louis. & Nash. R. R.,* 236 U. S. 318, 336. The question raised by the decision of the Court of Appeals is whether this protection may be denied in disregard of all existing precedents and of the principles on which the precedents depend, merely on the ground that the particular case is *sui generis* and hence may be decided on the basis of the Court's conceptions of policy rather than under the law. Since every case in which the question of privilege may arise will be unique in the sense that its facts are certain to differ in some respect from the facts in other cases, this principle of decision, if uncorrected, will permit the privilege to be disregarded or whittled away at the discretion of the lower Federal courts.

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[11] The Circuit Court cited no authority except the dictum in *Foster* v. *Hall,* 12 Pick 89, 97, that the privilege ". . . is an anomaly, and ought not to be extended."

B.

There is no dispute over the ultimate facts as they relate to the interview between petitioner and Judge Ardery:

On November 7, 1948, petitioner sought legal advice from Philip Ardery, a member of the Kentucky bar, and Judge Ardery's son (R. 8, 350-351). The District Court held that the relationship of attorney and client existed between petitioner and Philip Ardery and that statements made in that interview were privileged (R. 8, 356-357).

At the conference between petitioner and young Ardery, it was decided that they should seek further legal advice from Judge Ardery. The petitioner testified that he and young Ardery felt the need of such further legal advice and that Philip Ardery suggested that they consult his father, Judge Ardery (R. 352-353). Philip Ardery testified that the suggestion that they should consult his father was made during the consultation and that he could not say whether he or petitioner first made the suggestion (R. 347). The two young men drove together in young Ardery's car from Frankfort to Judge Ardery's home near Paris (R. 348). The petitioner approached Judge Ardery as he had approached his son, telling him he was in trouble and needed legal advice (R. 353). Judge Ardery asked him to come in and permitted the petitioner to unburden himself in confidence (R. 345, 353).

Both Judge Ardery and his son claimed the attorney-client privilege when called to testify before the Federal grand jury (R. 6-12). Both claimed the privilege on the same ground and neither did, in fact, testify before the grand jury (R. 7-9). Philip Ardery did not testify at the trial and Judge Ardery did not testify until directed to do so by the trial court (R. 361-362, 369).[12]

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[12] The District Court held that the conversation between Philip Ardery and petitioner was privileged (R. 356) and that any testimony that Philip Ardery might give would be restricted to those parts of the conversation between petitioner and Judge Ardery that he had overheard (R. 368-369). Philip Ardery was not called as a witness (R. 369).

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There is no conflict in the testimony of Judge Ardery and petitioner as to the nature and purpose of their conversation or as to their state of mind. Both understood that petitioner was seeking legal advice and that Judge Ardery intended to give legal advice. The trial judge questioned Judge Ardery sharply on this point and the colloquy that followed left no doubt as to Judge Ardery's intention (R. 344-345):

> "The Court: Of course, you and he both knew and understood that you, being the Circuit Judge, could not stand in the relation of his counsel or his attorney in regard to any matter which might come before the Court.
>
> "Judge Ardery: If Your Honor please, I regarded it in the light of—
>
> (Reporter's Note: Sentence not completed by Judge Ardery. H.G.B.)
>
> I think you will have a better understanding of my position if I might say to you, Judge, if I could say it, when Mr. Prichard appeared at that door that night he said, 'Judge, I am in deep trouble, and I want your advice.' I invited him into my home.
>
> "The Court: Is there anything else, gentlemen?
>
> Cross Examination
>
> By Leslie W. Morris, of Counsel for Defendants:
>
> "Q. You understood from that that it was legal advice, did you not, Judge? A. *Senator, I thought I could give it to him,* and if anything transpired later, I would not sit in the case.
>
> "The Court: Is that all gentlemen?
>
> (There was nothing further on this point.)" (Italics supplied)

The petitioner testified to the same effect. He stated that he went to see Judge Ardery because he and Philip Ardery "felt the need of further legal advice" and, after consulting with Philip Ardery, appellant decided that he "wanted to seek that legal advice from Judge Ardery" (R. 353).

Asked whether Judge Ardery consented to give him legal advice, the petitioner replied, "He did" (R. 353). The petitioner further testified: "I believe that while there might be some question as to the right of Judge Ardery to represent me, at least in Circuit Court in any matter, I believed after studying the law to the best of my ability that he did have a right to give me legal advice as an attorney" (R. 353). He testified that he went to Judge Ardery for that reason and that the first words he said to Judge Ardery were, "Judge Ardery, I am in trouble, and I need some legal advice" (R. 353).

In short, the uncontradicted testimony is that Philip Ardery, acting as petitioner's counsel, brought petitioner to Judge Ardery for legal advice; that the petitioner came to Judge Ardery for legal advice believing that the Judge could act as his legal adviser; that the Judge understood that petitioner was seeking legal advice and intended to give him legal advice and that Judge Ardery thought that the giving of the advice would not conflict with his official duties believing as he said, that "if anything transpired later, I would not sit in the case" (R. 345). Upon the basis of this uncontradicted testimony, the trial judge found that petitioner "sought legal advice from Judge Ardery" (R. 358), a finding which the Court of Appeals failed to mention.

C.

Petitioner submits that on these facts his confidential communications to Judge Ardery were privileged under the historic common law principle that the privilege covers any communication made in confidence by a person seeking legal advice to one reasonably believed to be capable of giving such advice. *Chirac* v. *Reinicker*, 11 Wheat. 280, 294; *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458; 8 *Wigmore, Evidence*, 3rd Ed. (1940) § 2302; *People* v. *Barker*, 60 Mich. 277, 27 N. W. 539 (1886); *State* v. *Russell*, 83 Wis. 330, 53 N. W. 441 (1892); *Calley* v. *Rich-*

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ards, 19 Beav. 401, 52 Eng. Rep. 406 (1854); *R.* v. *Choney*, 17 Man. 467 (1908). And see Rule 209B of the American Law Institute's *Model Code of Evidence*.

All of the elements required for the existence of the attorney-client privilege were present. The statements were made in confidence in an interview in which petitioner sought legal advice from Judge Ardery. The Court of Appeals conceded that Judge Ardery thought that he could give petitioner legal advice (R. 504, 507). From these facts it follows that both petitioner and Judge Ardery believed that Judge Ardery was not disqualified from giving petitioner legal advice. It must be assumed that Philip Ardery, petitioner's counsel, was of the same opinion; otherwise he would not have taken petitioner to Judge Ardery.

Giving appropriate weight to all the circumstances of the interview, including the fact of Judge Ardery's official position, the general policy of the law that justice will be promoted if confidence is preserved requires the protection of the privilege in this case. Indeed, so far as concerns the question of Judge Ardery's position, State courts in cases analogous to the case at bar have held that the reasons of policy underlying the attorney-client relationship apply with particular force to the protection of statements made in confidence by one who is suspected of crime and who seeks legal advice even from a law officer or a judge. *Bennett* v. *Commonwealth*, 234 Ky. 333, 28 S.W. (2d) 24 (1930); *People* v. *Pratt*, 133 Mich. 125, 94 N.W. 752 (1903). Decisions of this kind led Wigmore to conclude that a confidential disclosure made to a judge should be privileged even though the judge, unlike Judge Ardery, has not consented to give legal advice. *Wigmore, Evidence*, Third Edition (1940) § 2376(2).

The Court of Appeals held that for Judge Ardery to attempt to give petitioner legal advice was a breach of "accepted notions of judicial propriety," that these concepts of propriety "must have been known" to petitioner and that in any event he "may not deny knowledge" of them.

On that basis the Circuit Court denied the privilege. The Court of Appeals treated its own views on the propriety of petitioner's having sought legal advice from Judge Ardery, and of Judge Ardery's having accepted petitioner's confidence, as retroactively decisive of the claim of privilege. In deciding the case on that basis the court disregarded one of the traditional principles of the law governing the privilege. Judge Ardery and petitioner were not required, at petitioner's peril, to anticipate correctly the decision which the courts would make in a situation which the Court of Appeals itself described as *sui generis*. Under the decisions a reasonable belief in the capacity of the person to whom the confidential disclosure is made is enough to support the privilege; the belief is not required to be correct either in fact or in law. 8 *Wigmore, Evidence*, 3rd Ed. § 2302; *People* v. *Barker*, 60 Mich. 277, 27 N. W. 539 (1886); *State*. v. *Russell*, 83 Wis. 330, 53 N. W. 441 (1892); *Calley* v. *Richards*, 19 Beav. 401, 52 Eng. Rep. 406 (1854); *R.* v. *Choney*, 17 Man. 467 (1908); see *Smale* v. *United States*, 3 F. 2d 101, 102 (C.C.A. 7th, 1924); *Lew Moy* v. *United States*, 237 Fed. 50, 53 (C.C.A. 9th, 1916); *Alderman* v. *People*, 4 Mich. 414, 422 (1857); *Bacon* v. *Frisbie*, 80 N. Y. 394 (1880); *Coon* v. *Swan*, 30 Vt. 6 (1856); and see Rule 209B of American Law Institute's *Model Code of Evidence*.

The belief of Judge Ardery, Philip Ardery and petitioner in Judge Ardery's capacity was justified by the facts and by the pertinent precedents then existing for the guidance of the parties. The Circuit Court conceded that the Kentucky statutes did not disqualify Judge Ardery from giving petitioner legal advice.[13] Nor was the belief in Judge

[13] Section 30.120, par. 1, of the Kentucky Revised Statutes provides that "a judge of the Court of Appeals or circuit judge shall not practice law in any court of the state except in cases in which he was employed previous to his election, or in which he is personally interested." In effect, the Court of Appeals held that the statute did not apply. It pointed out that there are no Kentucky decisions construing the statutes, but that decisions in other states indicated that a statute of such limited purport does not disqualify

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Ardery's capacity to give petitioner legal advice *per se* unreasonable *merely* because Judge Ardery was to preside over a grand jury which was to investigate election frauds. Indeed, the existing precedents pointed to a contrary conclusion. The Court of Appeals of Kentucky had held that even a prosecuting attorney may be barred by the attorney-client relationship from testifying about what a prisoner had told him in confidence. *Bennett* v. *Commonwealth*, 234 Ky. 333, 28 S. W. (2d) 24 (1930). And the Supreme Court of Michigan had held that confidential disclosures made to a judge by a person suspected of crime were protected by the attorney-client privilege, even though the judge had convened the grand jury which was investigating the crime in question. *People* v. *Pratt*, 133 Mich. 125, 94 N. W. 752 (1903)[14]

The reasons assigned by the Circuit Court for its conclusion that the belief of Judge Ardery and petitioner in Judge Ardery's capacity was incorrect disregard well established principles of the law of privilege.

The first reason assigned by the Circuit Court for its conclusion was that even though the Kentucky statute did not disqualify Judge Ardery from giving legal advice to petitioner, the Judge was disqualified by "accepted notions of judicial propriety" (R. 508)[15] But the Court of Appeals conceded that under the decisions the fact that a judge acts as a legal adviser in violation of a statute does not affect his status as a lawyer so as to impair the rights of his client (R. 505). See *In re Silkman*, 88 App. Div. 102, 84 N. Y. Supp. 1025 (1903); *Conn. Mutual Life Ins.*

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a judge from giving legal advice. It also conceded that decisions hold "that even though a judge acts as a legal adviser in violation of a statute that does not affect his status of a lawyer so as to impair the rights of his client."

[14] The Circuit Court of Appeals did not discuss either of these decisions in its opinion.

[15] Citing Canon 31 of the Code of Judicial Ethics of the American Bar Association.

Co. v. *Most,* 39 Calif. App. (2d) 634, 103 P. (2d) 1013 (1940); *Baird* v. *Justice's Court,* 11 Calif. App. 439, 105 Pac. 259 (1909); *Appeal of Clark,* 119 Me. 150, 109 Atl. 752 (1920); 48 C. J. S. Judges § 9, at mm. 63-64; cf. *Eversole* v. *Huff,* 205 Ky. 314, 265 S. W. 797 (1924). The established principle that the privilege is not destroyed by violation of explicit statutory prohibition cannot be reconciled with the Court's conclusion that the privilege is destroyed by conduct violating "accepted notions of judicial propriety."

There is no precedent in the long history of the client-attorney privilege which supports the idea that the privilege may be destroyed by unethical action on the part of a lawyer or judge. If a lawyer violates the canons of legal ethics, or a judge violates those of judicial ethics, he may be subject to appropriate disciplinary proceedings. But the instant case is the first case, we believe, in which it has been held that a defendant in a criminal case should be penalized by the admission of evidence not otherwise available, because the defendant sought legal advice from a lawyer or a judge whose conduct falls short of the conception of legal or judicial ethics adopted by the court in which the case is being tried.

Another reason advanced by the Court of Appeals for its decision was that ultimately Judge Ardery did not give petitioner legal advice (R. 504, 507). The giving of legal advice is not essential to the existence of the privilege. In fact, the privilege may exist even though the relationship of attorney and client is never consummated. Communications preliminary to actual retainer, and communications which do not lead to a retainer are privileged so long as they are made for the purpose of obtaining legal advice. *Lew Moy* v. *United States,* 237 Fed. 50, 52-54 (C.C.A. 9th 1916); *Smale* v. *United States,* 3 F. 2d 101 (C.C.A. 7th 1924); *Minter* v. *Priest,* (1929) 1 K.B. 655, reversed on other grounds but affirmed on this (1930) App. Cas. 558; *Goode* v. *Commonwealth,* 241 Ky. 414, 44 S.W. (2d) 301 (1931); *People* v. *Dorrance,* 65 Cal. App. (2d) 125, 150 Pac. (2d) 10

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(1944); *Keir* v. *State*, 152 Fla. 389, 11 So. (2d) 886 (1943); *Evans* v. *State*, 5 Okla. Cr. 643, 115 Pac. 809 (1911); *Denver Tramway Co.* v. *Owens*, 20 Col. 107, 125, 36 Pac. 848 (1894); *Sargent* v. *Hampden*, 38 Me. 581, 584 (1854); *Strong* v. *Dodds*, 47 Vt. 348, 353-354 (1875).

Finally, the Court of Appeals held that petitioner's request for legal advice lacked good faith because petitioner knew that Judge Ardery was about to charge a grand jury with respect to election frauds. The District Court made no finding of fact that petitioner intended to affect or influence the grand jury proceeding or that he was prompted by any other improper or fraudulent motive. Nothing in the record would have supported such a finding had it been made. The petitioner testified as to the circumstances of his interview with Judge Ardery and on cross examination the prosecution did not even attempt to elicit any facts that would support a charge of bad faith.

The Circuit Court's conclusion ignores the role that Judge Ardery played in the consultation. Judge Ardery was not required to listen to petitioner's confidential disclosures; there is no suggestion even in the opinion of the Court of Appeals that he was tricked or surprised into permitting the interview. Since Judge Ardery voluntarily accepted petitioner's confidential disclosures, it was the judge who made the decisive choice that permitted the interview to take place. There is no support in the record for the suggestion made, at least by implication, in some portions of the opinion of the Court of Appeals that Judge Ardery was acting improperly. The District Court which heard the testimony of the persons concerned disposed of the question on the assumption that Judge Ardery throughout was acting in good faith and in an honest belief in his capacity to give petitioner legal advice. On these facts to say, as the Court of Appeals does, that the consultation between petitioner and Judge Ardery lacked the element of good faith is to destroy the privilege by the bare presumption or imputation of fraud. This Court has said that the privilege cannot

be destroyed by the mere charge of fraud and that to deny the privilege on that ground there must be at least *prima facie* evidence to support the charge. *Clark* v. *United States*, 289 U.S. 1, 15. In this case there is no evidence, and no findings by the District Court, to support the Circuit Court's imputation of fraud.

• • • •

The decision of the Circuit Court is contrary to the long established tradition that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 46 §34, 8th Ed. (1824) quoted in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949). The decision conflicts with the many decisions of Federal and state courts cited above. The question whether the historic privilege of lawyer and client is to be whittled away in the manner of the court below is an important question which should be resolved by this Court.

IV.

The Circuit Court's Holding that the District Court Committed No Error in Its Charge to the Jury is in Conflict With Applicable Decisions of this Court.

In the District Court's charge there were two passages in which the Court instructed the jury on the issue of finding one defendant guilty and the other not guilty. In an early part of the charge the court told the jury that if they believed beyond a reasonable doubt that Funk and Prichard had conspired between themselves or "that either one of them though not conspiring with the other, conspired with persons unknown to the Grand Jury for the purpose, and with the intention, of doing these acts charged in the indictment" then the jury "should find guilty the one or ones of the defendants which you believe guilty of the charge" (R. 469).

Near the end of the charge, after the court had completed a full discussion of the evidence relating to each defendant

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the Court stated: "the law, when you sum it up in brief, is simply this: . . . . You may find one of them guilty and the other not guilty" (R. 481). The court did not instruct the jury that to reach this result they must find that the guilty defendant had conspired with persons unknown or that such findings must be based on evidence that would convince the jury beyond a reasonable doubt of a conspiracy between the guilty defendant and persons unknown.

The court below held that any "ambiguity" existing in this latter instruction was cured when considered in the light of the entire charge (R. 510). But the District Court's concluding instruction to the jury was not merely "ambiguous"; it was erroneous. To tell the jury that they might find one defendant guilty and the other not guilty, without at the same time telling them that they must find in the record evidence that proved beyond a reasonable doubt that defendant had conspired with persons unknown, was prejudicial and reversible error. The error was accentuated because the statement was more specific than the trial court's earlier comment on the same subject and because it was one of the last things the trial court said to the jury before they retired to consider its verdict. "Particularly in a criminal trial, the Judge's last word is apt to be the decisive word." *Bollenbach* v. *United States*, 326 U.S. 607, 612. The fact that earlier in the charge the trial court had referred to the possibility of the participation of "unknown persons" does not cure the error of this last instruction. *Bollenbach* v. *United States*, 328 U.S. 607, 612; *Bihn* v. *United States*, 328 U.S. 633, 637; *Kraus & Bros.* v. *United States*, 327 U.S. 614, 626, 627.

To say the least, the erroneous instruction to the jury being the last one given on the question of the conviction of one defendant and the acquittal of the other *created* an ambiguity on an issue that is now essential to the conviction of petitioner, that is, whether, notwithstanding the acquittal of Funk the judgment against Prichard can stand on the ground that he conspired with persons unknown. "A con-

viction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach* v. *United States*, 328 U.S. 607, 613; *Kraus & Bros.* v. *United States*, 327 U.S. 614, 627.

CONCLUSION.

For the reasons that have been stated above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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